Supreme Court, U.S.
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No. 89-961

In The

Supreme Court of the United States

October Term, 1989

EDWARD LAMON AND LORRAINE LAMON,

Petitioners,

vs.

CITY OF WESTPORT, A MUNICIPAL CORPORATION; BILL WADE, JR., AND JANE DOE WADE, HIS WIFE; ORVILLE ENGLE AND JANE DOE ENGLE, HIS WIFE; FRANK SCHNIDER AND JANE DOE SCHNIDER, HIS WIFE; GARY PEDERSON AND JANE DOE PEDERSON, HIS WIFE; CHERYL AHERN AND JOHN DOE AHERN, HER HUSBAND; GLEYN BLEDSOE AND JANE DOE BLEDSOE, HIS WIFE; AND JOHN J. REGAN AND MABLE REGAN, HIS WIFE,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION

The statement contained in the Petition for Writ of Certiorari to the Supreme Court of the State of Washington regarding jurisdiction remains the same, except that reference should also be made to the Supreme Court Rules Rule 17 regarding considerations governing review on certiorari.

II. STATEMENT OF THE CASE

Petitioner's believe that the statement of the case set forth in their petition accurately sets forth the background regarding their claim that their due process rights under the United States Constitution were violated by arbitrary adjudicative procedures in the state trial court and appellate courts. It is submitted that the record in the state court shows clearly that the Court of Appeals ignored its own rules regarding (1) the necessity of having a complete record before it in making a decision, and (2) what issues were properly before it.

These rules are cited in the Petition for Certiorari, and were obviously designed to guarantee due process both under the federal constitution and the state constitution. The fact that the record before the Court of Appeals regarding publication was incomplete was brought to the attention of the court in oral argument and request was made that the record be completed if the court was to consider the issue of publication. It was also pointed out to the appellate court that the issue of publication under its own rules and decisions was not properly before the

court and therefore had not been addressed by petitioners in their brief.

The Washington Supreme Court has ruled that in appeals governed by the Rules of Appellate Procedure, a trial court is required to certify those matters relied on in ruling on a motion for summary judgment. *Millikan vs. Board of Directors*, 92 Wn.2d 213, 595 P.2d 533 (1979). In that case the court stated on page 215 as follows:

> The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record – no more and no less – considered by the trial court.

A decision based upon an incomplete trial record is obviously a denial of fairness, i.e. due process. The petitioners were never given notice that the appellate court would ignore its own rules and decide the case on an issue not properly before the court on review, and an issue where the record before them was incomplete.

Although the appellate court gave no explanation why it made a decision contrary to its own rules, it necessarily in making such a decision violated the Fourteenth Amendment due process rights of petitioners.

After the decision was issued by the Court of Appeals, petitioners moved the court to reconsider its decision and again pointed out that the decision was based upon an incomplete record regarding this issue and was contrary to its own rules of appeal. See App. 1 through 3 inclusive.

The Court of Appeals denied petitioner's motion for rehearing and petitioners then petitioned for review of

that decision by the Washington State Supreme Court. In this petition the issue of Fourteenth Amendment due process violations was clearly raised by petitioners.

In a footnote in respondent's Brief in Opposition to Petition for Writ of Certiorari, respondents state:

> Since the Washington State Supreme Court denied review of the underlying action, the Washington Court of Appeals' decision stands as the substantive basis for petitioners' claims for certiorari review.

No legal authority for this position is given, and indeed it is totally illogical. There is no final decision by the state courts until the Washington State Supreme Court denies review. The Petition for Review and denial are part of the state court records.

III. OPPOSITION TO CERTIORARI

The issue regarding jurisdiction which is the basis for petitioners' Petition for Certiorari is the state court's violation of petitioners' United States Constitutional right to fairness or due process, as guaranteed in the Fourteenth Amendment of the United States Constitution. The record in this case also shows that the petitioners' right to a jury trial was violated. It is submitted that the Seventh Amendment guarantee of a jury trial should be incorporated in the Fourteenth Amendment.

While the record must show that an issue under the United States Constitution or Code was necessarily raised before the state courts, the modern view is that it is not essential that a particular provision of the Constitution or

Code be specifically pointed out,[1] set out verbatim,[2] or cited.[3]

A decision in terms of a federal question on the state level is not essential; if the decision of the federal question was necessarily involved in the judgment rendered, it is not a matter of importance that a state court avoided all reference to the question. *Chapman vs. Goodnow's Admr.*, (1887) 123 U.S. 540, 31 L. Ed. 235, 8 S. Ct. 211; *Bell's G. R. Co. vs. Pennsylvania*, (1890) 134 U.S. 232, 33 L. Ed. 892, 10 S. Ct. 533; *Chicago, B. & Q. R. Co. vs. Chicago*, (1897) 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581.

State procedural rulings cannot be found to be independent of a claim that the procedural rulings themselves cause a denial of due process. See *Saunders vs. Shaw*, (1917) 37 S. Ct. 638, 244 U.S. 317, 61 L. Ed. 1163. In the enforcement of state rights as well as federal rights, state procedure can never be independent of the requirements of due process. There should be Supreme Court jurisdiction to review a state decision that refused consideration of any claim, state or federal, on procedural grounds that fell below due process requirements. See Federal Practice and Procedure, Wright, Miller, Cooper and Gressman (Jurisdiction and Related Matters § 4025).

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[1] *Spencer vs. Merchant*, 125 U.S. 345, 31 L. Ed. 763, 8 Sup. Ct. 921; *Bridge Proprietors vs. Hoboken and Co.*, 68 U.S. 116, 17 L. Ed. 571.

[2] *Furman vs. Nichol*, 75 U.S. 44, 19 L. Ed. 370.

[3] *Copperweld Steel Co. vs. Industrial Com. of Ohio*, 324 U.S. 780, 89 L. Ed. 1363, 65 S. Ct. 1006.

No issue is taken by petitioners with that line of cases that say that a prevailing party may assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.

Such an argument is irrelevant. The decision appealed from was the granting of summary judgment on the defendant's motion for summary judgment on the basis that as a matter of law, the designated file materials would not support an action for defamation and/or invasion of privacy. The trial court failed to indicate the basis upon which summary judgment of this motion was granted. It certainly was reasonable to assume that since the trial court had denied the defendant's motion on summary judgment due to lack of publication, that the second motion was granted on different grounds. The failure of the trial court to indicate the basis upon which summary judgment was granted is unfair and violative of 14th amendment rights. *Williams vs. City of St. Louis*, 783 F.2d 114 (8th Cir. 1986); *Fairfield Scientific Corp. vs. U.S*, 611 F.2d 854 (1978).

IV. CONCLUSION

The arbitrary adjudicative procedures in both the trial and appellate courts of Washington State, violated the due process rights of petitioners, and the Supreme Court has jurisdiction to consider the issue.

Dated: February 7, 1990

Respectfullly submitted,

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APPENDIX A

* * *

the certificate is there any reference to any depositions as being considered by the court in ruling on the motion on summary judgment where it granted summary judgment to the defendants on their second motion for summary judgment.

This court in its appeal applied the usual rules of summary judgment. It assumed for the purpose of the appeal that the LaMONS met their burden regarding a defamatory and false statement, found that the publication was unprivileged, but ruled against the LaMONS on an issue which was not rightfully before the court, to wit, publication.

At the oral argument, the attorney for the appellants pointed out to the court that there had not been a cross appeal by the defendants in this action, and that he did not feel that publication was an issue before the court. The attorney at that time indicated to the court that if they thought there was an issue on publication before the court that the records should be supplemented regarding this, and asked for the opportunity to address it in a supplemental brief.

* * *

summary judgment regarding publication brought by the defendants, then the court would have had to have the record identified with particularity by the judge who ruled on that motion. As stated in *Millikan vs. Board of Directors*, 92 Wn.2d 213, 595 P.2d 533 (1979), on page 214 as follows, to wit:

> "The Court of Appeals applied the rule of *American Universal Ins. Co. vs. Ranson*, 59 Wn.2d 811, 370 P.2d 867 (1962). There, at page 816, we explained the manner of and reason for specifying on appeal the matters considered in ruling on a motion for summary judgment:
>
> > "First, they may be incorporated in a statement of facts certified by the trial courts; second they maybe identified with particularity in the summary judgment signed by the trial court and then furnished to this court by transcripts certified by the clerk of the court. The reason is obvious: it would be unfair to consider, on appellate review, matters not presented to the trial court for its consideration. We must have before us the precise record – no more and no less – considered by the trial court."

In this case the court did not have all the matters before it regarding publication when it ruled regarding this issue in its opinion. This is unfair not only to the trial court, but to the appellants.

* * *

(f) of that rule states that all pleadings shall be so construed as to do substantial justice.

The purpose of this rule and its coordinate rules is to permit the merits of the case to be reached no matter how inept counsel may have been in the pleading stages of the controversy. The change in terminology emphasizes the fact that it is no longer necessary to state a "cause of action"; it is sufficient to make a short "statement of the claim showing the pleader is entitled to relief." *Original Ballet Russe vs. Ballet Theater*, (CCA.2d 1943) 133 Fed.2d 187, 189.

In conclusion, it is believed the court wrongfully considered the issue of publication in this appeal. Furthermore, if the court was going to consider the issue of publication, it should have had a proper record before it for this consideration. Finally, it is not necessary in Washington pleading to assert causes of action.

Since the husband and wife are separate legal entities, they are each parties when they assert separate causes of action no matter how inartfully done, and they are each entitled to

* * *